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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 33

INCRES STEAMSHIP COMPANY, LTD.,

Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

GEORGE S. LEISURE,
BRECK P. MCALLISTER,
2 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner, Incres Steamship Company, Ltd.

ROBERT S. OGDEN, JR.,
DONOVAN LEISURE NEWTON & IRVINE,
New York, New York,
of Counsel.

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crew under foreign articles entered into abroad while the ship happens temporarily to be in American waters. As this Court said: "The whole background of the Act is concerned with industrial strife between American employers and employees." (*id.* at 143-44) 11

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INCRES STEAMSHIP COMPANY, LTD.,

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INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled case on July 7, 1961 and the order and judgment entered on the remittitur of the Court of Appeals in the Supreme Court of the State of New York, New York County.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals of the State of New York dated and filed July 7, 1961, reprinted as Appendix C, *infra*, are reported at 10

N. Y. 2d 218. The majority and minority opinions in the Appellate Division of the Supreme Court of the State of New York, First Department, dated and filed July 6, 1960, reprinted as Appendix D, *infra*, are reported at 11 App. Div. 2d 177, 202 N. Y. S. 2d 692. The oral decision *per* Justice Greenberg, in the Supreme Court of the State of New York, New York County granting a permanent injunction, dated and filed May 25, 1960, has not yet been officially reported and is reprinted as Appendix E, *infra*. The oral decision *per* Justice Greenberg denying defendants' cross motion to dismiss the complaint, dated and filed May 19, 1960, has not yet been officially reported and is reprinted as Appendix F, *infra*.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was dated and entered on July 7, 1961. The jurisdiction of this court is invoked under 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

1. Whether the state court erred in applying the rule enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that "when an activity is arguably subject to §7 or §8 of the Act [The Labor Management Relations Act, as amended] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." (*id.* at 245), where the issue here is a question of law, on facts not in dispute, as to whether the Act applies at all to foreign owned, foreign

registered vessels flying foreign flags, manned by foreign crews serving under foreign articles entered abroad, the ships having come temporarily into American waters?

2. Whether the reach of the Labor Management Relations Act, as amended, extends to foreign owned, foreign registered ships flying foreign flags and their foreign seamen working under foreign seamen's articles entered abroad, the ships having temporarily come into American waters; and whether the Act thus deprives state courts of jurisdiction over an action in tort seeking injunctive relief and damages against an American seamen's union from picketing or urging or inducing crew members to desert and to refuse to perform their duties in violation of their seamen's articles and the orders of the Master?

STATUTE AND TREATY INVOLVED

Petitioner contends that the jurisdictional scope of the Labor Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. §§141-187, does not extend to the foreign ships here involved. The answer to this question cannot be resolved by reference to any particular section of the Act, which literally construed extends over all countries and all peoples. To illustrate this §141 and §152 (2), (3), (6) and (9) are reprinted in Appendix G, *infra*, pp. G1-G3.

Reprinted in Appendix G, *infra*, p. G1, are Articles VII, and XV of the Treaty of Friendship, Commerce and Navigation with the Republic of Liberia, Aug. 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

STATEMENT OF THE CASE

The Parties

Petitioner (plaintiff below), Ineres Steamship Company, Ltd. (hereinafter called "Ineres"), is a Liberian corporation (Par. 1 of Complaint, R. 10; Exhs. 1 and 2, R. 361, 363; R. 88, 91, 93-94, 104), owned by Italian nationals residing in Italy, with its principal office in London (R. 105). Ineres owns the ocean going passenger cruise vessels, SS NASSAU and MV VICTORIA (Exhs. 1 and 2, R. 361, 363; R. 89, 104).

Respondent (defendant below) the International Maritime Workers Union (hereinafter called "IMWU") is an American labor organization (Par. 12 of the Amended Answer, R. 44; R. 297) formed in November, 1959 (R. 284) by two American maritime unions—National Maritime Union and Seafarers International Union (R. 285)—for the "stated objectives" of organizing and representing alien seamen working on foreign flag vessels (Exh. E [not printed in Record]). Respondent and defendant below Shannon J. Wall is both principal officer of IMWU and an officer of the National Maritime Union (R. 284-285). None of the other defendants was served, nor did any make an appearance.

The Foreign Vessels and Crews

Both vessels are registered under the laws of Liberia and fly the Liberian flag (Par. 6 of Complaint, R. 11; Exhs. 1 and 2, R. 361, 363; R. 88-89, 91-92, 100, 118). The vessels are at present engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of Complaint, R. 11; R. 119). How-

ever, not all cruises originate in a United States port (R. 194), and cruises are made each year to European ports (R. 95, 194) including Genoa, Italy (R. 119) where the vessels undergo repairs and the crew takes its leave (R. 122). The *de facto* home port of the vessels is Genoa, Italy (Opinion of App. Div., R. 402). The crews of the vessels are non-resident aliens, almost all of whom are Italian (Par. 8 of Complaint, R. 11-12; R. 114-115, 178, 178). They are recruited and hired in Genoa (R. 110, 178) under a wage agreement for the duration of the voyage and the season (R. 110). They sign Liberian articles in Genoa (R. 192) in the presence of a Liberian consul (Exh. C, R. 369; R. 192, 267). The articles provide *inter alia* that "the terms of employment of the Master and the rest of the crew are governed by the laws of the Republic of Liberia . . ." and also that crew members ". . . shall be ready to sail for any voyage and any destination whatsoever, at any time, whenever they shall receive orders to such effect from the Master of the ship or whomsoever replaces him" (Exh. C, R. 369). The articles incorporate by reference a more detailed underlying contract governing wages, terms and conditions of employment (Exh. 4 [not printed in the Record]; R. 110, 234, 267). Provisions in this contract obligate each crew member, *inter alia*, to obey the orders of his superior, to return to the ship not later than two hours before sailing and to give notice of intention to terminate his employment at least 48 hours before arrival or departure of the vessel in port (R. 268-270).

Union Activities

In February 1960 IMWU initiated a campaign to organize crew members on the NASSAU and VICTORIA (R. 299).

On May 13, 1960, shortly after docking at pier 42, North River, New York City, the NASSAU—scheduled to depart on another cruise that same day—was met by an IMWU picket line (R. 218, 219, 237; Exhs. D and D-1 [not printed in record]). As a result of this picketing, longshoremen refused to load baggage, cargo and provisions on the NASSAU (Par. 12 of Complaint, R. 13; Wolfson Affid., R. 21; R. 219, 240, 241). Moreover, some crew members on the NASSAU, at the instigation of IMWU representatives on the dock, thereupon refused to obey orders to perform certain duties (Vagliasindi Affid., R. 24, 25; R. 218, 220, 257).

Later that same day, IMWU representatives from positions on the dock and on board the vessel caused about 100 crew members, without permission and in disobedience of their seamen's articles, to walk off the NASSAU approximately one hour before the vessel's scheduled departure (Pars. 11 and 13 of Complaint, R. 12-13; Wolfson Affid. R. 21; R. 219). These crew members refused to obey the order of the Captain that they return to the ship (Vagliasindi Affid., R. 25; R. 222-223). The NASSAU was left helpless and immobile at its berth, making it necessary to cancel the scheduled voyage (Pars. 15 and 22 of Complaint, R. 14, 16; Wolfson Affid., R. 21-22; Vagliasindi Affid., R. 26; R. 224-225, 250).

Two days later, on May 15, the IMWU took direct action against petitioner's other vessel, the VICTORIA, returning from a cruise to South America (R. 164-165). That day, pier 42, where the VICTORIA had been scheduled to dock (R. 164, 252), was occupied by the NASSAU, then still unable to sail (R. 252). Since other docking facilities could not

be obtained for the VICTORIA (R. 252-253), it was necessary to disembark its passengers by tug boats while the vessel lay at anchor in New York Harbor (R. 164). As passengers were being brought ashore, IMWU representatives in a small launch marked "UMD-2" approached and boarded the tug boats (R. 165-166). Immediately thereafter the tug boats ceased disembarking passengers and left the vicinity of the vessel (R. 166, 179). Later that same day, following the intervention of police officials, the tug boats resumed operations (R. 166).

The next day, May 16, the IMWU was served with a temporary restraining order which enjoined the union from picketing plaintiff's vessels or urging or encouraging crew members not to work on those vessels (R. 8-9). On the following day, May 17, early in the afternoon, passengers were being embarked by means of launches on the VICTORIA, which remained at anchor (R. 167). The vessel, scheduled to sail later that day (R. 167), was again approached by the launch UMD-2 (R. 139). Then, despite the restraining order, as the UMD-2 hovered near the vessel, IMWU representatives on board the launch urged the crew with a loudspeaker (R. 139, 212) not to sail (R. 139-141, 156, 160, 167-168, 180-181). This activity continued for approximately 40 minutes (R. 212).

A few hours later, when all of the passengers were on board and the VICTORIA was ready to sail as scheduled (R. 169), the members of the engine room department refused to run the engines (R. 158-159, 169, 173-174, 197, 201, 203). Representatives of the crew informed the Captain that they wished to confer with "the Union" (R. 174, 201). Because of this refusal the ship could not sail (R. 169, 203).

On the following day, the Captain of the VICTORIA permitted representatives of the crew to go ashore and meet with IMWU representatives (R. 174-175). Following this meeting, the crew members on shore contacted by radio telephone crew members remaining on the vessel and confirmed that the VICTORIA was not to sail (R. 176-177, 202-203). Thereupon the cruise was canceled, passengers disembarked and passage monies refunded (R. 177-178).

As a result of the picketing and other acts of interference by the IMWU, neither the NASSAU nor the VICTORIA was able to resume its normal operations until after the decision of the Supreme Court of New York (R. 374-382) granting the permanent injunction against picketing and other acts of interference.

Incres Line Agency, Inc. and Cosmopolitan Shipping Corporation

Incres has engaged the services of Incres Line Agency, Inc., a New York corporation with offices at 39 Broadway, as an agent to take care of the booking and arrival and departure arrangements of passengers in the United States (R. 106, 109). Incres Line Agency, Inc. accounts to Incres for the sale of passenger tickets (R. 111) and takes care of the provisioning of the ships when necessary in the United States (R. 109). Wolfson, president of the agency, may authorize repairs either after discussion with the president of Incres or occasionally with someone else (R. 111). The president of Incres, Vincenzo Berlingeri, an Italian citizen (R. 104), is also an unpaid officer and director of Incres Line Agency, Inc. (R. 113) and is provided office space at 39 Broadway when he stays in New York (R. 105).

Cosmopolitan Shipping Corporation with offices at 42 Broadway, New York City (R. 115) acts as ships' husband when the ships come into New York (R. 251), takes care of fueling (R. 112), loading, docking and disembarkation of passengers and hires linesmen, tugboats, and pilots (R. 251, 253). Cosmopolitan provides these services for other steamship lines as well as Ineres (R. 251).

The Litigation

Ineres commenced the present tort action for damages and injunctive relief in the Supreme Court of the State of New York, New York County, on May 16, 1960, by service on that date of a summons and complaint, a temporary restraining order and an order to show cause why a permanent injunction against defendants' activities should not issue, signed by Justice Greenberg. A hearing pursuant to said order to show cause commenced May 18, 1960.[1] The hearing continued over a four day period. The order and judgment of the Supreme Court of New York (Greenberg, J.) denied defendants' motion to dismiss the complaint, permanently enjoined defendants, and severed plaintiff's damage claim for trial in regular course. Defendants appealed to the Appellate Division, First Department, which by a three to two decision modified and affirmed the order and judgment below. Defendants appealed, and by a four to three decision the Court of Appeals reversed the order and judgment of the Appellate Division and dismissed the complaint.

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[1] During the course of the hearing counsel for the parties stipulated that the hearing be treated as a hearing for a permanent injunction.

This petition is for a writ addressed to the Supreme Court of the State of New York, New York County because under New York procedure the judgment and order dismissing the complaint was entered in that Court on remittitur from the Court of Appeals.

Stage in Proceedings and Manner in Which Federal Questions Were Raised

Defendants by cross motion to dismiss the complaint for lack of jurisdiction over the subject matter raised the federal questions of whether the Labor Management Relations Act, as amended, was intended to extend to the foreign ships involved in this case and whether it deprived the court of jurisdiction under the stated circumstances (R. 27). Defendants' amended answer in paragraph 31, by way of affirmative defense, alleged that the New York Court "lacks jurisdiction of the subject of the action and exclusive jurisdiction lies with the National Labor Relations Board" (R. 48). Defendants' second affirmative defense alleged that defendants' conduct ". . . was a lawful exercise of rights afforded by the Labor Management Relations Act, 1947" (R. 48).

The trial court denied defendants' cross motion to dismiss the complaint—noting an exception (opinion at R. 126-130; reprinted as Appendix F, *infra*). It then held that the Labor Management Relations Act did not deprive the court of jurisdiction in this case and that defendants' activities were unlawful and issued a permanent injunction—noting an exception (opinion at R. 374-382; reprinted as Appendix E, *infra*).

On appeal before both the Supreme Court, Appellate Division and the Court of Appeals the same federal questions were presented and decided.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Court of Appeals of the State of New York has decided important federal questions not in accord with the applicable decisions of this Court, in that:

1. The Court of Appeals erred in applying the pre-emption principle enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), to the instant case in which the question is whether the coverage of the Act extends at all to the foreign vessels here involved. If there is any "arguability" here, it is as to the very scope and reach of the Act itself, and the question is a pure question of law involving no special competence of the National Labor Relations Board; and

2. The Court of Appeals erred in not following the controlling decision in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act, as amended, does not extend to a foreign ship and its foreign crew under foreign articles entered into abroad while the ship happens temporarily to be in American waters. As this Court said: "The whole background of the Act is concerned with industrial strife between American employers and employees." (*id.* at 143-44)

The federal questions presented are of substance and should be settled by this Court. They involve the claim by American seamen's unions that federal labor law is applicable to protect their picketing and organizing activities in relation to the foreign employers and foreign seamen on board the great fleets of foreign vessels during their

short stays in the Port of New York and other ports of the United States while engaged constantly and continuously in international trade.

This Court made it clear in its opinion in the *Benz* case, *supra*, that if federal labor law is to be given any such application "the affirmative intention of the Congress" must be "clearly expressed" because:

> "It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." (353 U. S. at 147)

Argument

1. The Court of Appeals Erred in Applying the Preemption Principle of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959), to the Instant Case.

The New York Court of Appeals, citing the rule of *San Diego Building Trades Council* v. *Garmon*, *supra*, held that where activity is "arguably subject" to the National Labor Relations Act, both state and federal courts must defer to the "exclusive competence of the National Labor Relations Board." The state court concluded that "it is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should therefore hold . . . that at least until the board refuses jurisdiction the State courts have none." (*id.* Appendix C, p. C8)

The rule stated in the *Garmon* case was that "when an activity is arguably subject to §7 or §8 of the Act the States

as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." (*id.* at 245) The question there was whether particular conduct of persons, who were obviously within the jurisdictional coverage of the Act, was either protected or prohibited under §7 or §8 of the Act. Here, on the contrary, no such question is presented. The question here is whether the Labor Act was intended to apply to foreign ships at all. On this question of law, the Board has no special competence or experience and the *Gaynon* case does not apply. The state court should have reached and decided the question of the scope of the Labor Act.

In *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), this court, in reviewing the decision of a federal court sitting in diversity, reached and decided the issue of whether the Act applied to the foreign vessel there involved. Such a determination could not have been made if the pre-emption doctrine were applicable. Only the opinion of the dissent in the *Benz* case concluded that the controversy fell within the exclusive primary competence of the Board.

There is here no dispute as to the facts essential to the jurisdictional question.

The underlying issue here involves construction as to the very reach of the Act, as in the *Benz* case, and this requires consideration of not only legislative intent, but international maritime law and principles of comity and the Treaty of Friendship, Commerce and Navigation between the United States and Liberia, Aug. 8, 1938, 54 Stat. 1739, T. S. No. 956 (effective November 21, 1939).

2. The Court of Appeals Erred in Not Following the Controlling Authority of *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957).

This Court in the *Benz* case held squarely that "the . . . Act . . . [does not apply] to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." (*id.* at 138-139)

In considering the basic question as to the Congressional intent regarding the scope of the Act, this Court in *Benz* stated its conclusion that:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. . . . What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possession." (353 U. S. at 143-44)

The facts in the present case fit squarely within the holding of the *Benz* case in every essential particular. In both the vessels were foreign registered and flew a foreign flag, were owned by foreign corporations and were manned with alien crews serving under foreign articles entered

abroad. In both cases there was direct interference by American seamen's unions with the internal management and affairs of the vessels. In both cases defendants acted while the vessels were temporarily in United States ports. In the case at bar Ineres is owned by Italian nationals residing in Italy.

The majority of the state court distinguished *Benz* on the ground that the instant case involved ships which provided a "regular shuttle service" in and out of a United States port (Appendix C, p. C6) whereas the ship in the *Benz* case "happened temporarily to be in American waters" (Appendix C, p. C5).

In thus distinguishing the authority of the *Benz* decision, the state court has, we submit, committed serious error of law which should be corrected.

A multitude of foreign vessels have, throughout our history as a great maritime nation, conducted a "regular shuttle service" of passenger and freight vessels across the North Atlantic and South Atlantic and other great trade routes. We submit that the import of the decision of this Court in the *Benz* case does not mean that federal labor law is applicable to foreign ships that regularly or frequently trade in United States ports. We further submit that the *Benz* case in holding that the Labor Act does not apply to a foreign vessel, is consistent with applicable treaty and international maritime law and principles of comity in relations with friendly foreign nations.

These foreign ships come into United States ports expecting and relying on the United States to respect the established principle under treaty and international law

and comity that a nation should refrain from asserting jurisdiction over and interfering with the internal economy, discipline and affairs of foreign vessels. This Court has long respected and applied this principle. See *Lauritzen* v. *Larsen*, 345 U. S. 571, 581, 582 (1953); *United States* v. *Flores*, 289 U. S. 137, 155-157 (1933); *Wildenhus's Case*, 120 U. S. 1, 12 (1887). If the rationale of the *Benz* case is not followed and the reach of the Labor Act is construed to extend to foreign ships, the warning of this Court in *Lauritzen* v. *Larsen*, *supra*, would be frustrated:

> " . . . in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." (*id.* at 582)

The National Labor Relations Board has this year rendered three decisions in which it has upheld its jurisdiction over foreign vessels—two decisions being reviewable and one unreviewable.

The two reviewable decisions are *West India Fruit & Steamship Co., Inc.*, 130 NLRB No. 46 (Feb. 16, 1961), in which the employer and owner of the foreign vessel was a Virginia corporation wholly owned by American stockholders and *Peninsular & Occidental S. S. Co.*, 132 NLRB No. 1 (July 10, 1961), in which, again, ultimate beneficial ownership was held by Americans. In its most recent decision in a non-reviewable representation case, *Eastern Shipping Corp.*, 132 NLRB No. 72 (Aug. 10, 1961), the foreign vessel was 95% foreign owned.

The question of law presented in the instant case is thus of importance in the administration of the Labor Management Relations Act, as amended, as well as in settling the jurisdiction of state courts. It is important that the coverage of the Act be settled on this important point, which affects so vitally the conduct of the foreign commerce of the world when it touches at United States ports.

CONCLUSION

For the foregoing reasons, we urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

GEORGE S. LEISURE,
BRECK P. MCALLISTER,
Counsel for Petitioner, Incres Steamship Company, Ltd.

ROBERT S. OGDEN, JR.,
DONOVAN LEISURE NEWTON & IRVINE,
of Counsel.

APPENDIX A

REMITTITUR TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

In the Court of Appeals of the State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, *Presiding.*

Raymond J. Cannon, *Clerk.*

Remittitur July 7, 1961

Incres Steamship Company, Ltd., *Respondent-Appellant,* *vs.* International Maritime Workers Union & ano., *Appellants-Respondents.* *and* Edward Pogor, & ors., *Defendants.*	New York County Clerk's Index No. 7187-1960.

Be it remembered, That on the 11th day of April in the year of our Lord one thousand nine hundred and sixty-one, International Maritime [sic] Workers Union & ano.,

the appellants-respondents in this cause, came here unto the Court of Appeals, by Cooper, Ostrin & De Varco, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Ineres Steamship Company, Ltd., the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Donovan Leisure Newton & Irvine, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed. [not printed]

Whereupon, The said Court of Appeals having heard this cause argued by Mr. H. Howard Ostrin, of counsel for the appellants-respondents, and by Mr. Breck P. McAllister, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the complaint dismissed, with costs to the defendants-appellants-respondents in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

[SEAL]

(of the State of New York
Court of Appeals)

APPENDIX B

Judgment and Order of the Supreme Court of the State of New York, County of New York.

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff,

against

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

JUDGMENT

The above-named defendants having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, First Department, entered in this action on August 4, 1960, affirming and modifying in part the judgment in favor of the plaintiff against the defendants heretofore entered herein in the office of the Clerk of New York County on June 10, 1960; and the above-mentioned plaintiff having appealed to the Court of Appeals from said modification of said judgment, and the Court of Appeals having heard said appeals; and ordered that the judgment so appealed from be reversed and the complaint dismissed with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County and the order having been entered thereon making the order and judgment of said Court of Appeals the order and judgment of this Court;

Now, on motion of COOPER, OSTRIN & DE VARCO, attorneys for the defendants herein, it is hereby

ADJUDGED that the said judgment entered herein on August 4, 1960 be and the same hereby is reversed and the complaint dismissed; and it is hereby

ADJUDGED that the defendants recover of the plaintiff the sum of $2,585.84 costs as taxed, and that the defendants have execution therefor.

Dated: New York, N. Y.
August 18, 1961.

JAMES McGURRIN
Clerk

Appendix B

7187/1960

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse in the City of New York on the 7th day of August, 1961

PRESENT:

HON. BIRDIE AMSTERDAM
Justice.

[SAME TITLE]

ORDER

The above-mentioned defendants-appellants-respondents having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on August 4, 1960 in the office of the Clerk of New York County, and the above-mentioned plaintiff-respondent-appellant having appealed to the Court of Appeals from a part of said judgment, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be reversed and the complaint dismissed and judgment entered for the defendants-appellants-respondents with costs in all courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County,

Now, on motion of COOPER, OSTRIN & DE VARCO, attorneys for defendants-appellants-respondents,

IT IS ORDERED that the said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the judgment entered herein on August 4, 1960 be, and the same hereby is, reversed, and that a judgment of this Court be entered herein reversing said judgment with costs in all courts to the defendants-appellants-respondents.

ENTER

/s/ BIRDIE AMSTERDAM
J. S. C.

Filed Aug. 8, 1961

New York County Clerk's Office

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff-Respondent-Appellant,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL,

Defendants-Appellants-Respondents,

and

EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

Argued May 23, 1961; decided July 7, 1961.

DESMOND, *Chief Judge.*

Plaintiff Incres Steamship Company, Ltd., is a Liberian corporation owned by Italian stockholders. During seven months of each year it operates two Liberian-registered passenger ships, manned by alien crews signed on in Europe, on regularly scheduled cruises to Caribbean ports, originating at and returning to New York City. Its main office is in London and it has no place of business in Liberia but it has in New York City an office which it shares with a New York corporation (Incres Line Agency, Inc.) owned

and controlled by Incres. The New York office is run by its manager who is president of Incres and the New York corporation acts as agent for Incres in booking passengers for the cruises, arranging schedules, and providing supplies, repairs and the like.

Defendant International Maritime Workers Union (IMWU) is an American labor union formed in 1959 by two other American maritime unions, both affiliated with AFL-CIO, to organize and improve job conditions of merchant seamen employed on "flag-of-convenience" ships, that is, ships registered in foreign countries (principally in Liberia, Panama and Honduras) but whose beneficial owners are not otherwise connected with the nations whose flags they use. As the United States Supreme Court observed in *Lauritzen* v. *Larsen* (345 U. S. 571, 587): "It is common knowledge that in recent years a practice has grown, especially among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." American seamen's wages are several times as high as those paid by Incres. Beginning in February, 1960 representatives of IMWU began a campaign to organize plaintiff's seamen, going aboard the two vessels when docked in New York City and talking to the crew members. There were fruitless negotiations between Incres and the union. On May 13, 1960 the Incres cruise ship *Nassau* arriving at New York was met by IMWU representatives who, picketing peacefully, carried signs charging unfairness of Incres in refusing recognition to the union and demanding better wages and working conditions for the seamen. Later that day the IMWU pickets persuaded about 100 members of the *Nassau's* crew to leave the ship shortly before her scheduled departure and refuse to obey her captain's orders to return, resulting in a cancellation of the sailing. Two days later when the other Incres cruise

ship *Victoria* came into New York harbor she could not dock because the strike-bound *Nassau* occupied the berth. The *Victoria* lay at anchor. While her passengers were being brought ashore on tugs, IMWU representatives arrived in a launch, boarded the tugs and at least for a time persuaded the tug crews to stop disembarking the *Victoria's* passengers. As a result of the picketing and striking, several cruises were cancelled. The union filed with the National Labor Relations Board (NLRB) charges of unfair labor practices which are still pending. Incres began this action in Supreme Court, New York County, and obtained first a temporary, then after trial a permanent, injunction enjoining the union from picketing plaintiff's vessels or urging or encouraging crew members not to work on the vessels.

From the beginning the respective parties have taken the same two opposing positions as to which the Appellate Division divided 3 to 2 and which are again urged on us on this appeal. Incres argues, and both courts below held, that defendant's acts were illegal and tortious, and that the New York Supreme Court, not the National Labor Relations Board, had jurisdiction and power to restrain them. The union—and the two dissenting Justices at the Appellate Division—insist that the NLRB has under *San Diego Unions* v. *Garmon* (359 U. S. 236; see *Bodley* v. *Anton*, 8 N Y 2d 91) exclusive primary jurisdiction since the conduct complained of is at least "arguably" or "potentially" subject to Federal regulation as protected activity or prohibited unfair labor practice under the Labor Management Relations Act (U. S. Code, tit. 29, §141 *et seq.*). The only real question for us is whether the NLRB or the New York courts have jurisdiction of this controversy or, putting it more accurately, whether there is such doubt as to the applicability of the Federal statute that under the *San Diego Unions* v. *Garmon* "arguably subject" rule (359 U. S. 236,

245, *supra*) the State courts must yield to "the exclusive primary competence" of the NLRB.

The union, besides asserting the exclusive jurisdiction of the NLRB, argues that its conduct was not unlawful, that the New York courts have no power to enjoin a "maritime tort" and that, in any event, injunctive relief from a New York court is precluded by the "labor dispute" provisions of section 876-a of the Civil Practice Act. We will assume, as did the Appellate Division, that the union is wrong as to all those positions, and go to the real question —jurisdiction. (This court has jurisdiction of the appeal because the Appellate Division made a slight modification of the permanent injunction by changing the language which prohibited picketing the vessels "for any purpose" so as to read for "any such purpose"—that is, a limitation to the particular activity condemned.)

The whole issue may be stated thus: is this dispute "arguably subject" to NLRB jurisdiction or, on the contrary, has it been authoritatively determined that the Labor Management Relations Act is completely inapplicable to labor disputes between nationals of other countries operating ships under foreign flags? The Supreme Court has not definitively made answer to that, but recent judicial and NLRB history, some of it made since the Appellate Division decision here, leaves it disputable that the NLRB has primary jurisdiction. The NLRB has taken jurisdiction of several representation cases as to foreign flag vessels (*Peninsular & Occidental S. S. Co.*, 42 LRRM 1113 [1958]; *Eastern Shipping Corp.*, 44 LRRM 1571 [1959], and *West India Fruit & S. S. Co.*, 47 LRRM 1269 [1961]) and in *Navios Corp.* v. *National Mar. Union* (402 Pa. 325 [1960]) the United States Supreme Court (366 U. S. 905 [1961]) denied certiorari as to a Pennsylvania Supreme Court decision which had upheld dismissal of a State court suit on the

ground of exclusive NLRB jurisdiction. Both the NLRB holding in the *West India* case and the denial of certiorari in *Navios* came after the Appellate Division's determination of the present case. In retaining jurisdiction in *West India Fruit & S. S. Co.*, the National Labor Relations Board wrote most comprehensively, reviewing practically every aspect of this question. We shall discuss that holding later on in this opinion but we say now that it clearly refutes the allegation in paragraph 17 of the complaint in the present action that the Federal labor relations statute does not "apply to foreign ships with foreign crews in any way".

Ineres cites *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138) and *Marine Cooks* v. *Panama S. S. Co.* (362 U. S. 365) as final authority that the Federal act has no coverage of internal labor relations between a foreign ship and its foreign workers. The union answers correctly that the *Benz* case as explained in the *Marine Cooks Union* opinion related only to a ship which "happened temporarily to be in American waters" (see 362 U. S., p. 369). *Benz* marked the point of division in the Appellate Division. However, the emphasis in *Benz* on the transient character of the American contacts of the ship there involved makes it impossible to regard the *Benz* holding, as the Appellate Division majority did, as a determination that "Congress did not intend to apply the Federal statute at all to foreign shipping." Left open by the *Benz* case was the question of what shipping is so "foreign" as to be excluded. All agree that foreign registration is not enough (see *Atran Transp. Co.* v. *National Mar. Union*, 169 F. Supp. 416, cited by the Supreme Court in the *Marine Cooks Union* opinion, 362 U. S. 365, 371, *supra*). All agree that Congress has power to intrude on the internal economy of a foreign-registered ship as a condition to permitting entry into American ports or waters (see *Benz* v. *Compania Naviera Hidalgo*, 353

U. S. 138, 144-145, 147, *supra*). The unresolved question is as to whether Congress intended its statute to apply to labor relations on a ship which while foreign-registered, foreign-crewed and foreign-owned has an American port as one of the two termini of its fixed, regular shuttle service, conducts an important part of its business from a New York City office and has no office at all in Liberia, the country whose flag its vessels fly. Is it possible to argue that those American "contacts" are sufficient for NLRB jurisdiction? The Federal Supreme Court, whatever answer it may finally give as to that, has already told us in the *Garner* v. *Teamsters Union* (346 U. S. 485, 490) and *San Diego Unions* v. *Garmon* (359 U. S. 236, 244, *supra*) cases that the State courts are "not primary tribunals to adjudicate such issues", that these determinations must "be left in the first instance to the National Labor Relations Board" and, where conduct complained of is "arguably" or "potentially" subject to regulation and the Federal act, "States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" to avert "state interference with national policy". Under the board's *West India Fruit & S. S. Co.* decision (47 LRRM 1269, *supra*) it is, we think, certainly uncertain whether the board could validly or would take jurisdiction of this controversy. Indeed, a complaint by the union against alleged unfair labor practices by Incres has been pending before the board for a year without any decision as to jurisdiction or merits.

The ship in the *West India Fruit & S. S. Co.* case (47 LRRM 1269, *supra*) was the freighter *Sea Level* flying the Liberian flag and owned by a Liberian corporation but operating as a common carrier between Louisiana and Cuba, and with a Cuban crew. Clearly, held the board, she was engaged in "commerce" under the Federal act; the alleged unfair labor practices "affected" commerce under the act

and nothing in the act exempts the maritime industry or seafarers. The "ship-territory" doctrine, said the board, has nothing to do with the territorial reach of the statute (*Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 123) and so there is no "extraterritoriality" to interfere with applying the Federal statute to a foreign ship in American waters. The board concluded that there was nothing to prevent Congress applying this law to events occurring on foreign-registered ships in domestic waters.

The question, said the board, was whether Congress, empowered as it is to regulate such ships while engaged in our foreign commerce, has by this act chosen to do so. The answer, it said, cannot be all inclusive but must under Supreme Court rulings be found by ascertaining and valuing the contacts between the transactions and the governments whose laws are in competition and by weighing the significance of one or more of those contacts (see *Lauritzen v. Larsen*, 345 U. S. 571, 578, *supra*, and *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, *supra*). To warrant application of American law, held the board, not all significant contacts need be American. Neither the "flag law" nor American ownership nor the nonresident status of the crew nor the "internal order doctrine" nor any applicable treaty is necessarily decisive, one way or the other. The board noted that the controversy was between an American union and an American employer, since the owner corporation and its stockholders were American. But the result reached by the board did not necessarily turn on those latter circumstances. The American contacts, held the board, were that the "dispute arose aboard a vessel which engaged exclusively in American foreign commerce, which operates regularly out of an American port, and which is drydocked and regularly provisioned in the United States." The foreign contacts, it said, were "the registry of the vessel and the

nationality of the crew which works under foreign articles signed, however, in the United States." The *Benz* case (*supra*), so the board thought, meant no more than that "the Labor Act does not extend to a foreign flag vessel, its foreign owner and foreign crew absent substantial American commerce". While the board's decision mentions the American nationality of the stockholders of the foreign corporation operating the *Sea Level*, no particular point is made of that "contact" and there is no indication that the result would have been different had the stockholders been nationals of other countries. If the board had meant that domestic incorporation or domestic stock ownership was the essential thing, it could have said so. In *Eastern Shipping Corp.* (44 LRRM 1571 [1959], *supra*) beneficial ownership of the foreign corporation was shown to be 95% foreign, but the board in a nonfinal decision overruled its Regional Director who had dismissed a representation proceeding because it involved labor relations on a "foreign" ship.

All the other arguments against NLRB jurisdiction as put forth by Ineres here, including the "national policy" argument, were rejected in the board's opinion in the *West India Fruit & S. S. Co.* proceeding (47 LRRM 1269, *supra*). It is surely "arguable" that the board would exercise jurisdiction in the dispute as to which this injunction was ordered. We should, therefore, hold as we did in *Dooley v. Anton* (8 N Y 2d 91, *supra*) that at least until the board refuses jurisdiction the State courts have none.

The judgment should be reversed and the complaint dismissed, with costs to defendants-appellants-respondents in all courts.

Appendix C

DISSENTING OPINION PER FULD, J.

FULD, J. (dissenting). The plaintiff, Ineres Steamship Company, Ltd., owns and operates two ocean-going liners generally engaged in the passenger cruise trade between New York City and Caribbean ports. In the spring of 1960, the defendant Maritime Workers Union organized, picketed and struck those vessels, completely disrupting their operations. The plaintiff thereupon instituted this action for injunctive relief and damages. The court at Special Term, denying a motion made by the defendants to dismiss the suit for lack of jurisdiction, granted the plaintiff the broad injunction which it had sought. The Appellate Division, though it agreed with all that the trial court had decided, modified the resulting judgment so as to limit the injunction "to the condemned [illegal] activity * * * presented in this case". Both plaintiff and the defendants appeal to us as of right.

We are called upon to construe the National Labor Relations Act, for the jurisdiction of the courts over the subject matter of this action depends upon whether the National Labor Relations Board has jurisdiction under that statute. If the Board has such jurisdiction, then, the courts have no authority to act. More specifically, the question presented for decision is whether the Act applies to a controversy affecting a foreign (Liberian) flagship—engaged in foreign commerce bringing it to and from United States ports for short stays—which is 100% owned and controlled by foreign nationals and manned by a foreign crew, recruited and hired in the ship's home port in Italy and serving under foreign articles entered abroad.

In our view, the answer is clearly in the negative. Indeed, as Justice BREITEL observed in his comprehensive opinion for the Appellate Division, such a conclusion finds

strong support in recent decisions of the Supreme Court. (See *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138; *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365; see; also, *Lauritzen* v. *Larsen*, 345 U. S. 571.) "Our study of the Act", wrote the court in the *Benz* case, "leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees" (353 U. S., at pp. 143-144).

The circumstance that there was here substantial continuing American foreign commerce and that the plaintiff had a New York corporation to act as its American agent is not sufficient to render inapplicable the rationale underlying the *Benz* decision and vest the National Labor Relations Board with jurisdiction. All-important in the case before us is the fact that the vessels were owned and controlled by Italian nationals and that their home port was, for all essential purposes, in Genoa; in addition, it might be noted, their crews, entirely alien, consisted largely of Italians who had signed on in Italy under contracts made abroad. In our judgment, if the National Labor Relations Act were to be held to cover the foreign-owned ships here involved simply because they dock in New York City and employ a New York corporation as their American agent, it would follow that the Act applies to give the board jurisdiction over controversies involving seamen on board the great fleets of foreign flag and foreign-owned passenger and cargo vessels while engaged in trips between the Port of New York and the foreign countries.

It is hardly necessary to observe that in terms of comity between nations such a result could not help but have a disastrous effect. When in the *Benz* case the argument was advanced as to the Act's applicability to foreign-owned

ships, the Supreme Court expressed its concern in these words: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts" (353 U. S., at p. 147). Indeed, in *Lauritzen* v. *Larsen* (345 U. S. 571, *supra*), the court had earlier remarked that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction" (p. 582).

We will not impute to Congress—unless the intention is clearly expressed (cf. *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285-286)—a concern to deal with the labor relations of alien seamen on foreign flag vessels, owned by foreign nationals, throughout the world or even while they are in American waters. The fact that our American laws apply to crews, no matter what their nationality, employed on American-owned vessels does not militate against our conclusion. It is the proper concern of Congress in passing labor laws to regulate and control conditions on American ships while they are in American waters, as well as while they are on the high seas and in foreign ports.

A completely different case is presented where the ship, flying a foreign flag of convenience, is actually owned and controlled by American nationals. In such a case—and this is the sort of case which is relied upon to support the argu-

ment and the conclusion that the National Labor Relations Act has given the board jurisdiction (see, e.g., *West India Fruit & S. S. Co.*, 130 NLRB No. 46, 47 LRRM 1269; *Peninsular & Occidental S. S. Co.*, 120 NLRB 1097, 42 LRRM 1113; *Navios Corp.* v. *National Mar. Union*, 402 Pa. 325)—the ship may, in a very real sense, be regarded as sufficiently "American" to justify the invocation of the Federal statute.[1]

It has been urged that, even though it may ultimately be decided that the National Labor Relations Act does not apply to cover the controversy here involved, the pre-emption principles enunciated by the Supreme Court require that this matter be initially presented to the National Labor Relations Board. (See, e.g., *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245; *Dooley* v. *Anton*, 8 N Y 2d 91.) This is clearly not a *Garmon* or a *Dooley* type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity, under the Act. If there is "arguability" here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. In other words, as we have already stated, the question here is whether the Act applies at all to a strike or

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[1] There can be no doubt that in the cases cited the operative fact was ownership by American nationals. Thus, in the *West India* case (130 NLRB No. 46), not only does the board's prevailing opinion remark and stress again and again the vessel's American ownership (e.g., pp. 3, 15, 24, 25, 27, 32), but the dissenting opinion in so many words notes that the majority "have determined that, pursuant to Section 2 (6) and (7), the jurisdictional reach of the Act extends to the operations of American shipowners who register their vessels with, and fly the flags of, foreign nations, and that the policies of the Act will be effectuated by asserting jurisdiction over these shipowners and their operations" (p. 43).

controversy arising out of the organization of the crew of a foreign flag vessel, owned and controlled by foreign nationals and manned by a foreign crew recruited abroad and serving under foreign articles executed abroad.

In point of fact, in the *Benz* case (353 U. S. 138, *supra*), the Supreme Court actually passed upon the issue whether the Act applied to the foreign flagship there involved. Such a determination could not have been made if the pre-emption doctrine were applicable, since that doctrine precludes federal courts—including the Supreme Court—as well as state courts, from taking jurisdiction over activities which arguably involve an unfair labor practice or protected conduct. (See *San Diego Unions* v. *Garmon*, 359 U. S. 236, 244-245, *supra*; *Plumbers' Union* v. *Door County*, 359 U. S. 354.) But courts, neither state nor federal, need step aside to permit the National Labor Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern.

In sum, therefore, it is our opinion that the National Labor Relations Act does not apply to a foreign flagship owned by foreign nationals, that the board does not have jurisdiction and that such a determination may in the first instance be made by a state court.

As to the further contention advanced by the defendants that section 876-a of the Civil Practice Act bars issuance of an injunction in this case, it is necessary merely to say that, since, as found by the courts below, the defendants' conduct was for an illegal purpose and the means employed by them to accomplish that purpose unlawful (see, e.g., *Southern S. S. Co.* v. *Labor Bd.*, 316 U. S. 31, 38 *et seq.*; *Simpson* v. *Hamburg-Amer. Line*, 1939 A. M. C. 1469, 1480), the injunction issued by Special Term, as modified by the Appellate

Division, may not be successfully attacked as impermissible. (See, e.g., *Goodwins, Inc.*, v. *Hagedorn*, 303 N. Y. 300, 305-306; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101.)

We would affirm the judgment appealed from.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Fuld dissents in an opinion in which Judge Burke concurs and in which Judge Van Voorhis concurs in the following memorandum: I concur in the dissenting opinion by Judge Fuld except that I do not reach the question whether the same result would obtain in case of vessels of foreign registry but domestic ownership.

Judgment reversed, etc.

APPENDIX D

In the Appellate Division of the Supreme Court of the State of New York.

Incres Steamship Company, Ltd.,

Respondent,

against

International Maritime Workers' Union, Shannon J. Wall, Edward Pogor, John Doe and Richard Roe,

Appellants.

MAJORITY AND MINORITY OPINIONS IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

First Department, July 6, 1960.

Breitel, *Justice.*

The question in this case is whether an American labor union may strike a foreign ship engaged in foreign commerce while such ship is in an American port and, if not, whether a State court may enjoin such activity.

After a trial, Special Term granted a permanent injunction. The union has appealed.

Plaintiff is a Liberian corporation, actually owned and controlled by Italian nationals. It owns two cruise ships, which are registered in Liberia and fly, as a flag of convenience, the flag of that nation. The ships are claimed to have Monrovia, Liberia, as their home port, although it

is conceded that the ships have not been known to have visited that port. The ships, catering largely to American custom, generally ply the sea lanes between New York City and ports in the Caribbean. Their crews are of Italian nationality and are recruited under written articles in Italy. The crews take their leave, and the ships are refitted or repaired in Genoa, Italy, on annual European cruises.

Defendant union is called the International Maritime Workers Union. It was conceived in 1959 at a conference of maritime unions held in London, England, and was formed shortly thereafter by two American maritime unions. Its purpose is to organize foreign seamen employed in ships flying various foreign flags of convenience, which ships are competitive with those that fly the American flag and maintain high labor standards.

The union picketed, organized, and eventually struck plaintiff's two ships while in New York City. As a result the sailings were cancelled. This action ensued and resulted in the permanent injunction which now bars the union from such activity.

There are some peripheral issues and facts raised in the case but they are hardly determinative: The union stresses the American contacts of the ships by pointing out that their affairs are largely managed in New York City, by an agency corporation, controlled and owned by plaintiff, but incorporated in New York. It stresses too that the cruises run by plaintiff originate in New York City and return there. Plaintiff, on the other hand, stresses various disputed acts committed by the union which it claims to be illegal, but which, on the analysis in this case, it is not necessary to reach.

There are some simple conclusions to be first derived, before the more difficult aspect of the cases are considered.

First, the Liberian nationality of plaintiff and the Liberian registry of the ships should not be conclusive of the character of shipping involved. The National Labor Relations Board, in appropriate cases involving "American" ships flying foreign flags of convenience has so determined, and the conclusions are entirely persuasive (*Peninsular & Occidental S. S. Co.*, 120 N. L. R. B. 1097 [7958]; *Eastern Shipping Corp.*, N. L. R. B. Case No. 12-RC-415 [1959], CCH-NLRB Dec. ¶56,698 [1959-1960]). So, too, has the United States District Court in this district (*Afran Transp. Co.* v. *National Mar. Union*, 169 F. Supp. 416 [Bryan, J.], in an especially well-considered opinion, cited with evident respect by the Supreme Court in *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365). Looking beyond the flag of convenience, however, does not change the character of the ships here from foreign to domestic. The shipping is still foreign—Italian in fact—because of Italian ownership, Italian crews, Italian contracts of hiring, and because the ships are engaged in foreign commerce on the high seas. Quite a different case would be presented if the ships were used exclusively or largely on inland waterways, or for that matter, if one or more of the other factors mentioned were changed. This does not mean that a change in any of these factors would require a contrary result. It is that there would then be a doubtful question of applicability of the Federal labor statute and the rule in *Garner* v. *Teamsters Union* (346 U. S. 485) and *San Diego Unions* v. *Garmon* (359 U. S. 236) would apply. (See *Dooley* v. *Anton*, 8 N Y 2d 91.).

Second, in the absence of Federal pre-emption of the field by Federal labor statutes or preclusion of jurisdiction by virtue of labor anti-injunction statutes, the striking or other interference with the internal management of the crew of a vessel away from its home port is illegal (*Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31). Such inter-

ference is illegal because it violates public policy, and, in the case of an American ship, is even a criminal act (U. S. Code, tit. 18, §§2192, 2193). Thus, in the *Southern S. S.* case, it was held that the National Labor Relations Board could not order the reinstatement of seamen discharged for striking an American ship away from its home port even though it had also found that the men had struck because of the employer's unfair labor practices in violation of the then National Labor Relations Act. The court said (pp. 38-39): "Ever since men have gone to sea, the relationship of master to seamen has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority. We shall consider in a moment the nature and scope of the criminal sanctions imposed in case of revolt and mutiny. But it is worth noting here that the form of the 'shipping articles,' which the master and every member of the crew must sign prior to the voyage, has been carefuly prescribed by Congress, and that these articles contain this promise: 'And the said crew agree * * * to be obedient to the lawful commands of the said master * * * and their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore * * *' U. S. C., Title 46, §§564, 713. On the other hand, workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and

watches, wages, and return transportation to this country if destitute abroad. U. S. C., Title 46, §§651-692, 1131. It is in this setting of fact and law that we must test the validity of the Board's order of reinstatement." The court went on to find that "the strike was unlawful from its very inception" (p. 48). The policy underlying this principle in the law of the sea is one that has had recognition for a long time, and insofar as foreign ships are concerned, has special vitality because of the comity among nations (cf. *Wildenhus's Case*, 120 U. S. 1; *Lauritzen* v. *Larsen*, 345 U. S. 571).

Third, apart from the question of public policy pervading foreign shipping, and particularly the law of the sea as to the management of a ship's crew, the union activity would be privileged? That is, the economic self-interest of American workers to protect themselves from the competitive depredations of others using foreign labor working under substandard conditions would provide just cause for the intentional economic injury directed to such competition (see Frankfurter and Greene, Labor Injunction, 24 *et seq.*; Forkosch, Treatise on Labor Law, 398 *et seq.*; *Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 260). While most of the cases and most of the commentators have considered only domestic disputes, the same principle of justification which applies in the domestic dispute in reason and policy should apply to one involving foreign commerce,* provided of course, no other overriding policy or law makes the activity illegal.

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* On this analysis, there is disagreement with the conclusion of the trial court that defendant union did not have an economic self-interest in seeking to organize plaintiff's ships, which interest might justify the union's economic activity, provided its methods did not fail of legality for other reasons, such as interference with the ship's discipline, secondary boycott, and the like.

On application of but these three conclusions last discussed, the union's activity was wrongful and not privileged, because it interfered with the engagement and management of the ships' crews while the ships were away from the home port. For this purpose, obviously, Monrovia is not the home port, but neither is New York City, merely because the latter is the most important port in the traffic carried by the ships. For the purposes of this *de facto* Italian line, it is evident that Genoa in Italy is the home port.

But the discussion may not be concluded at this point. The questions still remain whether there has been Federal preemption by virtue of the Federal labor statutes and whether there are any jurisdictionally inhibiting labor anti-injunction statutes.

The Supreme Court has held that the National Labor Management Relations Act does not apply to foreign shipping. In *Benz* v. *Compania Naviera Hidalgo* (353 U. S. 138, 142-144), the court said, referring to the Federal Labor Management Relations Act:

"The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not 'cover a dispute between a foreign ship and its foreign crew' • • •

"Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Later, in *Marine Cooks* v. *Panama S.S. Co.*, (263 U. S. 365, 369), the court, speaking of its holding in the *Benz* case, said: "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the

internal labor relations of a foreign ship and its foreign workers under contract made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not "pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law."

Notably, the Supreme Court did not hold that there was a Congressional abstention from regulating in the field, so that there might be a pre-emption by silence, that is, an intention to leave the area of foreign shipping untrammelled by the several regulatory prohibitions and protections provided in the Federal statute. Instead, it held that Congress did not intend to apply the Federal statute at all to foreign shipping. In consequence, the rule in *Garner* v. *Teamsters Union* (346 U. S. 485, *supra*) and *San Diego Unions* v. *Garmon*, *supra*, (359 U. S. 236, *supra*) is similarly inapplicable.

True, in this case, as distinguished from the *Benz* case, the contact with the American port is regular rather than a one-instance occurrence. But, in both cases, the custom is American: in the one a cargo of wheat was to be taken on for transhipment, while in the other it consists of American passengers. The distinction is not sufficient to avoid the impact of the holding in the *Benz* case.* Moreover, until

* "But application of American statutes to labor relations on board foreign oceangoing vessels only tranitorially in United States waters presents different problems and must be considered in light of principles of international law. Under settled doctrine, ports and adjacent waters are within the sovereign territory of the coastal state, which may, therefore, prohibit access by foreign vessels or permit entry only on such conditions as it may choose to impose. The absolute power of the coastal state is tempered, however, by the demands

(Continued on page D8)

the Supreme Court narrows the major premise of the holding in the *Benz* case, a State court is concluded by it.

In the airline field there is an example of intentional Congressional abstention from applying a labor statute to events and relationships occurring in foreign commerce outside the continental United States. Thus it has been held that the Railway Labor Act (U. S. Code, tit. 45, §151 *et seq.*) does not apply to employees of American airlines engaged in flights between points outside the continental United States, based entirely and exclusively on legislative intention (*Air Line Stewards* v. *Northwest Airlines*, 267 F. 2d 170, cert. denied 361 U. S. 901; see, also, *Air Line Dispatchers Assn.* v. *National Mediation Bd.*, 189 F. 2d 685, 690, cert. denied 342 U. S. 849).

Consequently, it is not possible to find that the Federal labor statute applies to foreign shipping or to the dispute

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(Continued from page D7)

of comity among nations, which require it to exercise a high degree of self-restraint, particularly in matters involving the 'internal economy' of a foreign vessel.

"In determining whether to exercise its sovereign prerogatives, the coastal state must consider its self interest shared with other nations—an 'inclusive' interest—in free commercial navigation in addition to the local interests which it seeks to protect by exercise of jurisdiction—its 'exclusive' interests—and the exclusive interests of foreign states. Regulation which constitutes an unreasonable interference with the internal economy of foreign ships may evoke defensive exercise of jurisdiction by other coastal states, thus subjecting oceangoing vessels to different laws in every port. For example, if a coastal state required that every vessel entering its waters employ a crew consisting entirely of the coastal state's nationals, other states might be forced to respond by comparable legislation, and mutually beneficial world trade would be brought to a virtual standstill." (Comment: The Flag-of-Convenience Fleet, 69 Yale L. J. 498, 504-505.)

which gave rise to this case. Hence, there is no Federal pre-emption ousting the State courts of jurisdiction.

The Federal labor anti-injunction statute (U. S. Code, tit. 29, §101 *et seq.*) applies, of course, only to the Federal courts. In *Maring Cooks* v. *Panama S. S. Co.* (362 U. S. 365, *supra*), it was held that the Federal anti-injunction statute deprived Federal courts of jurisdiction to enjoin illegal labor union activity in foreign shipping, even though the Federal labor statute (Labor Management Relations Act) did not apply. In brief, it was held that the anti-injunction statute had a broader applicability than did the regulatory labor statute.

While it is true that New York's labor anti-injunction statute (Civ. Prac. Act, §876-a) was closely fashioned after the Federal statute, and it is even arguable that it was intended to be even more restrictive of judicial labor injunctions, the New York statute has been much more narrowly defined by the highest court of this State. It has been held that, in order for a dispute to qualify under the statute as a "genuine labor dispute", the dispute must have had a "lawful purpose". (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y., 300, 305; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101; cf. *Florsheim Shoe Store Co.* v. *Shoe Salesmen's Union*, 288 N. Y. 188; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226; *Opera on Tour* v. *Weber*, 285 N. Y. 348; *Thompson* v. *Beckhout*, 273 N. Y. 390; see *Max's Furs & Ready-to-Wear* v. *Bauer*, 282 N. Y. 334; *Arnold Bakers* v. *Strauss*, 1 A D 2d 604, 608, appeal dismissed 2 N Y 2d 721.) As a novel question one might well quarrel with such a rendition of the statute, but the weight of authority is hardly escapable by an intermediate appellate court.

Consequently, it is concluded that no labor anti-injunction statute precludes the State court from enjoining the "illegal" activity of defendant union in striking plain-

tiff's ships and picketing for the purpose of inducing a breach of the articles of hiring of the ships' crews and the disciplines of the ships.

In reaching these conclusions one is aware of the substantial competitive effect of these foreign flag ships upon the condition of the American seaman. But the problem is one for Congress. It has the power to take whatever action is necessary, for the solution is largely limited only by its own discretion (*Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, 142, *supra*). Indeed, the Federal Government has not hesitated in many areas to intrude on the "internal economy" of a foreign ship as a condition to entry into American ports (see *Benz* case, *supra*, pp. 144-45). It is one thing for Congress to intrude in this field; it would be quite another for the courts to do so. This was expressed succinctly in the *Benz* case: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." (p. 147.) A State court can hardly say less; it should not say more.

On the foregoing reasoning the order and judgment granting a permanent injunction should be substantially affirmed. In one respect, however, it requires modification. The second ordering paragraph should be modified to provide that the words "also from picketing said vessels for any purpose" should read "also from picketing said vessels for any such purpose", the word "such" being necessary to limit the injunction to the condemned activity as presented in this case.

Accordingly, the order and judgment should be modified, on the law and the facts, and in the exercise of discretion, to insert the word "such" in the second ordering paragraph as hereinabove-mentioned, and should otherwise be affirmed, with costs to plaintiff-respondent.

Botein, P. J. (dissenting). Plaintiff, a corporation organized under the laws of Liberia, operates two cruise vessels under the Liberian flag. All of plaintiff's officers and shareholders are foreign nationals; and the ships are manned by alien crews hired at Genoa, Italy. No Liberian citizen, however, plays any role in either the management of plaintiff or in the operation of its ships.

All of plaintiff's cruises originate in New York, and its passengers are principally Americans. Plaintiff occupies common office space in the City of New York with its agency, a New York corporation. Plaintiff's president is also an officer and director of the agency, which sometimes alone, sometimes jointly with plaintiff, provisions the ships, books passengers, schedules departures and arrivals and attends to ships' repairs—all out of the New York office.

Defendant International Maritime Workers Union was formed recently by two large maritime unions affiliated with AFL-CIO. An avowed major purpose, recited in the preamble to the union's constitution, is to bring strong and responsible union representation to the crews of ships flying so-called "flags of convenience". Defendant union contends that plaintiff's ships fall into this category, and that their victimized crews are denied human dignity, decent wages and working conditions. When plaintiff's vessels ply regularly in and out of New York, the union claims their substandard labor conditions also pose a real menace to the preservation of the high, hard-won standards prevailing on American flag vessels under contract with American maritime unions.

Appendix D

Representatives of the union made contact with crew members aboard both of plaintiff's vessels, for the purpose of organizing them, to the end that they would be represented by the union. They also picketed both ships upon their arrival in New York Harbor and were successful in preventing their scheduled departures. The picketing at all times was orderly and peaceful—in fact, the pickets never exceeded three in number.

Plaintiff served a summons and complaint seeking a permanent injunction and damages of defendant union and its executive director. Following trial an order and judgment were entered, denying defendants' motion to dismiss the complaint on the ground the court lacked jurisdiction over the subject matter, permanently enjoining defendants from interfering in any way with the operation and management of the two ships and from picketing them for any purpose and severing and reserving plaintiff's claim for damages for later trial.

In holding that jurisdiction resided in the State courts, the Justice at Special Term relied solidly on the 1957 decision of the Supreme Court in *Benz* v. *Compania Naviera Hidalgo, S. A.* (353 U. S. 138), which he said was "squarely on all fours with the instant case". In the *Benz* case, as here, the vessel, a foreign tramp steamer, flew the Liberian flag, had foreign owners, and the crew complement was composed of foreign nationals. Unlike the fact situation presented here, however, the owners of the steamer in the *Benz* case had no office or agents in the United States, and the ship did not receive the major part of its business from American nationals nor visit an American port regularly; and after a single, initial, fairly haphazard contact with an American port the steamer left United States territorial waters and thereafter had no charter commitment to return. Again, unlike the instant

case, in which a union has sought directly to organize foreign seamen on a foreign ship to preserve, among other things, American wage and working standards, in *Benz* the unions were interested primarily in the internal economy of the ship and picketed out of sympathy for a strike of foreign seamen.

As the opinion itself indicates, the *Benz* case had rather special facts (p. 142): "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

The compass of the *Benz* holding was recently outlined succinctly in *Marine Cooks* v. *Panama S.S. Co.* (362 U. S. 365). In the latter case the Supreme Court said (p. 369): "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not preempt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law."

The court in this later case was again confronted with the picketing of a Liberian ship, manned by an alien crew. In this situation, however, there was no labor dispute between the ship's employees and the ship's management. The picketing, carried on by an American union, was to protest the loss of AFL-CIO seamen's livelihood to foreign

flag ships with substandard wages and conditions. In these circumstances the Supreme Court rejected the District Court's assumption of jurisdiction to issue an injunction on that court's stated ground that the picketing was an "unlawful interference with foreign commerce" and interfered "in the internal economy of a vessel registered under the flag of a friendly foreign power". This position had been also adopted by the Court of Appeals, in reliance almost entirely on the holding in the *Benz* case (265 F. 2d 780, 786 [C. C. A. 9th, 1959]).

While the Supreme Court in *Marine Cooks* expressly bottomed its dismissal of the petition for an injunction on the limitations upon the courts' jurisdiction imposed by the Norris-La Guardia Act (U. S. Code, tit. 29, §101 *et seq.*), it gave expression to some intriguing dictum. In a footnote (p. 371) the court pointed to the special facts present in the *Benz* situation (362 U. S. 365, 371-372 n. 12): "Unlike the situation in the *Benz* case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on behalf of the foreign employees as in *Benz*. Though the employer here was foreign, the dispute was domestic. For a thoughtful discussion of the impact of foreign employment upon American labor standards, see *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416, 1959 Am. Mar. Cas. 326 (holding that the Norris-La Guardia Act withdrew from Federal District Courts jurisdiction to issue labor injunctions in a labor dispute strikingly like the one here involved). But see *Fianza Cia. Nav. S. A.* v. *Benz*, 1959 Am. Mar. Cas. 1758, 37 CCH Lab. Cas. ¶65,495."

Therefore, in the *Benz* case not only were there no substantial American contacts with the ship operated under the foreign flag of convenience, such as are present in this case; but the picketing by the unions was evidently viewed as prompted essentially out of sympathy for the objectives of foreign seamen on a foreign boat, and not to better the lot of American sailors. The three domestic unions, by injecting themselves into this wholly foreign dispute, placed themselves in the traditionally dangerous position of strangers intermeddling in a family fight.

It has been argued forcefully that the considerations of "international relations", "possibilities of international discord", etc., which so troubled the court in the *Benz* case when contemplating the applicability of the Labor Management Relations Act to foreign ships with foreign crews, are relevant with regard to the rights guaranteed to employees under section 7 of the act but are not relevant with regard to the prohibitions of section 8 of the act. (Comment *"The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing."* 69 Yale L. J. 498, 516, 523.)

The National Labor Relations Board had in a somewhat similar situation refused to apply the protections of section 7 of the act while enforcing the prohibitions of section 8. (Cf. *Matter of Sailors' Union of Pacific [Moore Dry Dock Co.]*, 92 N. L. R. B. 547 [1950], with *Compania Maritima Sansoc Limitada*, Case No. 20-RC-809 [5/1/50], CCH NLRB Decisions 1950-1951, ¶10,081.) Only the dissenter in *Benz* accepted this argument (353 U. S. 138, 147-150). (Cf. *Teamsters Union v. New York, New Haven & Hartford R. R. Co.*, 350 U. S. 155 [1956].)

Even at common law it was recognized that the deck of a visiting ship afforded no sanctuary from certain rights of local government; and that "all things done on board

which affected only the vessel or those belonging to her, and *did not involve the peace or dignity of the country, or the tranquility of the port*, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged" (*Wildenhus's Case*, 120 U. S. 1, 12 [1887]) (emphasis supplied).

The instant case would appear to rest somewhere between the situations posed in *Benz*, on the one hand, and *Marine Cooks*, on the other. Defendants here were picketing not only on behalf of the foreign employees of a foreign ship, as in *Benz*, but on their own behalf, as in *Marine Cooks*. And whatever might be plaintiff's status under international law, by all practical labor relations reckoning its operations are as singularly domestic as though its ships sailed the Great Lakes.

If the *Benz* rule is applicable to all ships flying flags of convenience, it apparently has not been followed by the National Labor Relations Board as devoutly as it should have been by the tribunal endowed with "exclusive primary competence" (*San Diego Union* v. *Garmon*, 359 U. S. 236, 245) in these matters. In *Peninsular & Occidental S.S. Co.* (120 N. L. R. B. 1097 [1958]) the board found jurisdiction and distinguished the *Benz* case where "the employer, as we have found above, is a domestic corporation, not a foreign national and the crews include a number of American citizens and resident aliens. Moreover, the crews do not sign shipping articles containing conditions of employment prescribed by a foreign government, but rather sign old type American articles. As for the ships, their home port is, for all practical purposes, at Miami, Florida. Further, though they are registered under foreign laws, they clearly do not operate under foreign laws, the crews, as noted, signing American shipping articles and the only inspections of these ships being performed by agencies of the United States Government." (120 N. L. R. B. 1097, 1101-1102, n. 7.)

In the most recent case the union, evidently unable to establish indirect American ownership of the ships flying flags of convenience, as in *Peninsular & Occidental*, urged instead that jurisdiction should be asserted by the National Labor Relations Board regardless of the nationality of the owner of the vessel. The Regional Director dismissed the petition for an election, but the board ordered the petition reinstated to resolve the substantial and material issues presented (*Eastern Shipping Corp.-McCormick Shipping Corp.* [*S. I. U.*], 12-RC 415 [9 21 59], CCH NLRB Dec. 1959-1960, ¶56,698).

Accordingly, the National Labor Relations Board apparently does not consider the fact that the employer is a foreign entity operating a ship under the flag of a foreign country as an insurmountable barrier to the assertion of its jurisdiction in labor disputes. For all that appears, the board may take the view that its jurisdiction is proscribed by the *Benz* case only when some pre-existing, previously confined shipboard dispute spills onto the dock, where an American union lends a hand. (Cf. Comment Yale L. J., *op. cit. supra*, p. 521.) Short of that, the board may take the position that, while it will not afford relief under section 7 because of possible conflict with settled rules of international law and principles of comity, it will enforce the prohibitions of section 8 against an American union which engages in prohibited concerted activity directed against a foreign ship regularly doing business in a United States port. It must be borne in mind that the board may maintain jurisdiction if it has the statutory power either to protect or prohibit the activities in issue.

In such event, and at the very least, it can be argued strongly that this controversy involves rights and obligations exclusively within the primary jurisdiction of the National Labor Relations Board, to which under the Labor Management Relations Act both State and Federal courts

must defer when conduct complained of in a labor dispute is either protected or proscribed by the act. The basis and rationale of this policy are stated in *Garner* v. *Teamsters Union* (346 U. S. 485, 490-491): "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and especially constituted tribunal and described a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies • • •. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261."

In *San Diego Unions* v. *Garmon* (359 U. S. 236, 244) the Supreme Court defined the boundaries of judicial action still more sharply, holding that when "an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (p. 245). The court stated (pp. 244-245): "At times it has not been clear whether the particular activity

regulated by the States was governed by '7 or '8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board."

Chapter 7 of title 29 of the United States Code will be searched in vain for language to support the contention that by statutory inhibition the jurisdiction given the National Labor Relations Board by the Labor Management Relations Act does not encompass labor disputes involving "foreign" ships. The term "commerce" includes "trade, traffic, commerce, transportation * * * among the several States * * * or between any foreign country and any State * * * or between points in the same State * * * but through * * * any foreign country" (§152, subd. [6]). The term "affecting commerce" includes "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (§152, subd. [7]).

We are told that Congress created the National Labor Relations Board to provide reasonable measures to prevent the disruption of "interstate and foreign commerce" (*Consolidated Edison Co.* v. *Labor Bd.*, 305 U. S. 197, 221-222 [1938]). That the dispute at issue in this case has disrupted "foreign commerce" is beyond argument. The decision in the *Benz* case, relying as it does exclusively on negative legislative history, must be confined rigorously to the fact situation presented by that case. Otherwise, the finding that the Labor Management Relations Act does not apply to "wage disputes arising on foreign vessels between

nationals of other countries when the vessel comes within our territorial waters" (353 U. S. 138, p. 142) would ignore the plain provisions of the act. Throughout the *Benz* case the court carefully limits the scope of its decision by restrictive language such as "such disputes" and the "circumstances such as those posed here" (pp. 142, 144).

Accordingly, neither the act, the board nor the Federal courts have ever held that the plain terms of the Labor Management Relations Act do not encompass "foreign" shipping. To the contrary, the board and the courts have indicated that the act may apply when a union of American workmen takes collective action against a foreign ship in the interest of preserving "the terms and conditions of their employment" by stabilizing "competitive wage rates and working conditions within and between industries" (U. S. Code, tit. 29, §151). (Cf. *Afran Transp. Co. v. National Maritime Union, op. cit. supra; Eastern Shipping Corp. [S. I. U.], op. cit., supra.*)

Accordingly, the order denying defendants' motion to dismiss the complaint for lack of jurisdiction should be reversed and the motion granted; and the judgment granting a permanent injunction should be reversed and the complaint dismissed, both reversals on the law and the facts.

VALENTE and MCNALLY, JJ., concur with BREITEL, J.; BOTEIN, P. J., dissents and votes to reverse and dismiss the complaint in opinion, in which STEVENS, J., concurs.

Order and judgment modified, on the law and on the facts and in the exercise of discretion, to insert the word "such" in the second ordering paragraph as mentioned in the opinion of Mr. Justice BREITEL, and, as so modified, affirmed, with costs to plaintiff-respondent.

Settle order.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

INCRES STEAMSHIP COMPANY, LTD.,

Plaintiff,

against

INTERNATIONAL MARITIME WORKERS UNION, SHANNON J. WALL, EDWARD POGOR, JOHN DOE and RICHARD ROE,

Defendants.

ORAL OPINION OF JUSTICE HENRY CLAY GREENBERG GRANTING PERMANENT INJUNCTION

Decided May 25, 1960

GREENBERG, *Justice.*

The Court: (Greenberg, J.) Gentlemen, as I have said repeatedly, this case has given me considerable pause and concern, because, in a way, it presents, perhaps, a new principle of law, particularly in so far as the State Courts are concerned. In another way it presents nothing particularly new or novel from the standpoint of Labor management relations, except in so far as the principles and the facts are concerned, the relationship between the seamen and the Master of a ship and the relationship between the seamen of that ship and the American Union.

First let me state that when this case originally started on the first motion made to dismiss because of lack of jurisdiction in the court the Court got the distinct impression that the defendant Union here urged strongly that it was in no way involved in this strike; that it did not call the strike, and that the seamen aboard the *Nassau* and the *Victoria* on their own volition initiated such acts as have

been portrayed here in the course of the trial. Thereafter, while Mr. Wall was on the stand, and again this morning Mr. Ostrin, counsel for the defendants, has stated that the strike was called by an American Union. So I think we can start with the accepted proposition, in contradistinction to the position taken by the Union at the beginning—I hope I am not wrong in this—that the American Union, the defendant herein, has been the moving and motivating spirit in the organizing of the seamen on the S/S *Nassau* and the S/S *Victoria* and had been responsible for the strike which was called and the ensuing picketing.

I have gone over this lengthy record, covering more than four hundred pages, and have tried strenuously to orient myself to the attitude of the Labor Union in this case, as well as the position taken by the plaintiff herein. I have carefully considered again the Benz case and the Marine Cooks & Stewards case, and I want to say to Mr. Ostrin that I have boundless respect for the judgments and opinions and views of Judge Frederick Van Pelt Bryan, upon whose opinion in the Afran case he placed so much stress. However, as an umpire in a baseball game, in a sense, I am called upon to call the shots, to use an expression of Judge Learned Hand, as I see them. If there be error committed by me, that error may be corrected by a higher tribunal.

We must start out with the proposition, to be sure contested to some extent by the defendants, that the operation of the *Nassau* and the *Victoria* was a distinctly foreign operation. The evidence shows that the vessels were foreign owned, foreign controlled, and that the seamen aboard the two vessels were all concededly foreign nationals; that they were recruited abroad and that they undertook employment pursuant to agreement effected in a foreign jurisdiction. Also, these ships were flying a foreign flag that came into this country under foreign registry.

Appendix E

I am aware of the fact, of course, that the Ineres Steamship Company has an agency in America, and that it is claimed by the defendants that this agency transformed the operation from a strictly foreign operation, at least to a partial American operation. I cannot subscribe to this argument by the defendants in this case. True enough, Mr. Wolfson, of the American corporation, had a measure of control. True enough, there was a relationship between the president of the foreign company and Mr. Wolfson of the American company. The fact remains, nevertheless, that even though there was an American agency here, this corporation, Ineres Steamship Company, Ltd., must be deemed, and the Court concludes, that it is a foreign company which had its control not only of the corporate affairs, but over the internal affairs, economic and otherwise, of the two ships, the SS. *Nassau* and the SS. *Victoria*.

I am unable to find that there is a dispute between an American union in furtherance of legitimate American trade union objectives, against Ineres. I cannot find that there is a dispute between an American union in furtherance of legitimate American trade union objectives and an American corporation, to wit, Ineres Line Agency, Inc. On the contrary, I think the record speaks overwhelmingly in favor of the conclusion reached by the Court that this strike was undertaken in the first place, by an American union for the purpose of organizing foreign nationals bound under articles of an agreement with a foreign corporation on ships which were controlled by Masters who also were foreign. In the second place, it cannot be said that there is a labor dispute between an American union, either at common law in the purview of Section 876-a of the State Law or in the light of the Federal Labor Relations Act. Indeed there could not, on the basis of this, be a labor dispute between the instant parties.

It seems clear to me, in spite of the studied effort on the part of the defendants to bring themselves within the arena or the orbit of the Marine Cooks & Stewards case, that there was not a fight or a contest on the part of an American union in furtherance of legitimate American trade union objectives. Mr. Wall on the witness stand was hard put to answer the questions addressed to him by counsel and by the Court to show how the organizing of the seamen on these two vessels would affect legitimate American trade union objectives.

May I say parenthetically at this point, and not by way of apology, or defense, that this Court has shown by many of its decided cases, it has demonstrated a complete sympathy for the aspirations and legitimate objectives of the American trade union movement.

In cases which have gone to the Court of Appeals and in one instance to the Supreme Court of the United States, this Court went a far way in protecting the right of Labor to conduct an organization picketing campaign for a period of almost two years. And while this Court has suffered a reversal at the hands of the Appellate Division by a divided Court, the Court of Appeals equally divided four to three, sustained the views this Court had advanced.

I mention this so that the defendants will know, as well as the plaintiff, that labor has been a deep and abiding concern with this Court. At the same time, as a sworn judicial officer I am compelled to dispose of these matters on the basis of the facts and on the law as I construe it.

Now, here we have a case which in my judgment, upon reflection and consideration, falls squarely within the four corners of the Benz case and even within the general language employed by Mr. Justice Black in the Marine Cooks and Stewards case. There the Learned Justice of the Supreme Court said in two places in his opinion:

"The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict federal court jurisdiction in controversies involving labor disputes. Nothing was said or intimated in Benz that would justify an inference that because a state court has jurisdiction to award damages in labor disputes, the United States Courts have the power to issue injunctions in like situation."

And again almost at the conclusion of the opinion the Justice said:

"There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under state or federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now we come down to the real heart or meat of the case and that is this: Does an American Union consisting of American Nationals have the right and the power to instigate a strike, to organize foreign Nationals on a foreign registered boat and cause picketing to be thrown, in a sense, around these boats and thus interfere with the internal economy and affairs of these boats?

We have already alluded to the specific relationship which exists between the Master of a ship and the crew. And I think therein lies the great distinction between the factual picture presented here and the analogy sought to be drawn by Mr. Ostrin in the case where a foreign National had come into this country and had gone into business and then had imported foreign Nationals who were not citizens to conduct that business here. There is not that relationship which exists between a Master and

a crew, where for the safety of the ship and the passengers the Master has the Supreme power to conduct its affairs without any interference by any outside agency, whether it be an American Union or some other agency.

These ships have come into this country and, true, are subject generally to our laws: health, labor laws, generally where certain requirements are made under the State law or the Federal law. But when we deal with the situation—and therein I draw a distinction which might be deemed by the defendants to be a very fine, thin and narrow one—where we come to deal with the matter of seeking to interfere, and that is precisely what happened here and there is no escape from it, with the internal management of a ship which has come into this port, with foreign Nationals, foreign owned, of a foreign nation. Does that American Labor Union have the right, I repeat, to organize the members of that ship; the crew, the stewards and the others, and to cause a strike to be called at the pier? The answer of this Court is that it does not have that power under any of the decided cases drawn to the attention of this Court, as the Court itself construes those cases. If that is the fact, then obviously an act or any act on the part of the American Labor Union, in calling a strike of the seamen and others on board these ships constituted an interference with the management and the economic affairs of that ship and resulted in a prima facie tort in so far as the ships themselves are concerned. In the view of this Court they had no right to go aboard that ship even with the permission of the Captain for the purpose of organizing the members of the crew and others. They had no right to call a strike and they had no right to picket this ship.

I base this conclusion not alone on the *Benz* case which would be sufficient, because there Mr. Justice Clark was

careful to point out that in his research of the debate in Congress and the notes there taken that the purpose of the Norris-LaGuardia Act was to protect American seamen dealing with American business interests. That was the central theme and the motivations for the enactment of that Act. Here, however, the situation is completely different. We are dealing with, and I regret to have to repeat this again, an attempt on the part of an American Union which is seeking, according to this record, not to protect the economic position of American seamen but is seeking to organize the members of the crew for its own purposes, that is, for the purposes of the defendant International Maritime Workers Union.

I have considered, although briefly, the supplemental memorandum submitted by the defendants but I am not persuaded that they have been able to place the facts in this case within the four corners of the ambit, to use Mr. Ostrin's word, of the Marine Cooks and Stewards case.

Mr. Justice Black was careful, as I said, in the disposition of the original motion, to point out the distinction between the Benz case and the facts in the Marine Cooks & Stewards case, and that very distinction is the basis for the disposition now being made by this Court.

I should like to allude to the decision of the Supreme Court in Southern Steamship Company against N. L. R. B., reported in 316 U. S. 31, a 1942 decision, wherein the Court held that seamen who engaged in a strike on board a vessel tied up at a dock, away from its home port, were not entitled to reinstatement by the N. L. R. B. following their discharge, and the Court specifically rejected the argument, as I have read the case, that the situation was different where the ship was tied to a dock. To all intents and purposes, while subject to American laws, it is still a foreign owned, foreign operated, foreign registered ship, and therefore was

controlled by foreign laws in so far as the internal operation and management of the ships are concerned. Accordingly, this Court concludes that the defendants in this case had no right either under the Federal Act or the State Act, to call a strike or to picket the ships Nassau and Victoria. If they had no right to call the strike and to picket, they were interfering with recognized international rights under international treaties with the ownership of the ships Nassau and Victoria, and, further, this interference constituted a tort which this Court is not called upon to protect and should not protect.

I think that it would present a most intolerable situation if we were to permit or if the Courts were to permit an American union, however laudable the objectives may be, and I think they are laudable, at least as shown by the articles of incorporation, or the constitution—I repeat, it would present an intolerable situation to permit an American union to interfere with the recognized rights of foreign nationals, of the crew, where a boat is foreign registered and foreign operated and controlled, even though that management is shared in part by an American agency resident in this country.

I find that there is no basis for the picketing in the light of the law as I construe it, and, accordingly, the Court grants the injunction, a permanent injunction, on the basis of the stipulation entered into between the parties.

You may settle findings and conclusions of law and judgment, although the Court states that its oral decision here rendered is in compliance with the appropriate provisions of the Civil Practice Act, with an appropriate exception to the defendants.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

[SAME TITLE]

ORAL OPINION OF JUSTICE HENRY CLAY GREENBERG DENYING DEFENDANTS' CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION

Decided May 19, 1960

GREENBERG, *Justice.*

The Court: And I must confess that, while the matter is not free from doubt, I have come to the conclusion that jurisdiction resides in the State Court. I have come to that conclusion on the basis of my very careful study last night of the principal authorities cited to the Court, namely Benz *vs.* Compania etc., reported in 353 U. S. 138, and Marine Cooks and Stewards *vs.* Panama Steamship Company, a very recent case decided on April 18, 1960, reported in the Supreme Court Reporter, Volume 80, No. 12, at page 779, *et seq.*

Mr. Justice Clark in the Benz case was very careful to note that: "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to

extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill."

Then, Mr. Justice Clark stated: "The problem presented is not a new one to the Congress." He then continues to consider the Seamen's Act of March 4, 1915, and draws a distinction between that Act and the one under consideration now, to show that where Congress intended to speak in regard to seamen's affairs, particularly foreign nationals, it did so in explicit language in the Seamen's Act of March 4, 1915, but was completely silent in the act which is involved in this case.

I do not think it is necessary for me to recite the facts in the Benz case as it is clearly in the minds of both of the respective parties here. And that case would seem to be squarely on all fours with the instant case, and would leave no doubt in the Court's mind but for the holding and some of the language in the Marine Cooks and Stewards case, alluded to before. If this case were to be decided solely upon the decision in the Benz case, the Court would be left with no alternative but to hold that the State court has jurisdiction in the instant case, as Congress has not undertaken to speak in relation to ships under foreign register involving seamen of foreign origin and nationals of a foreign jurisdiction.

We come now, before I allude to the facts here, to the holding in the Marine Cooks and Stewards case. There Mr. Justice Black undertook to distinguish the two cases, and he said as follows: "The Benz case thus considered the jurisdiction of a State court not the jurisdiction of a Federal court, whereas the purpose of the Norris-LaGuardia Act was to restrict Federal court jurisdiction in contro-

versies involving labor disputes. Nothing was said or intimated in Benz, that would justify an inference that because a State court has jurisdiction to award damages in labor disputes the United States courts have the power to issue injunctions in like situations."

In a footnote Mr. Justice Black said: "Unlike the situation in the Benz case, in which American unions to which the foreign seamen did not belong picketed the foreign ship in sympathy with the strike of the foreign seamen aboard, the union members here were not interested in the internal economy of the ship, but rather were interested in preserving job opportunities for themselves in this country. They were picketing on their own behalf, not on the behalf of the foreign employees as in Benz."

I think that distinction is persuasive on the contested issue of jurisdiction in this case.

Then Mr. Justice Black said: "There is not presented to us here, and we do not decide, whether the picketing of petitioner was tortious under State or Federal law. All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown."

Now taking up the facts in the instant case: We find in the record, without dispute, that the *Nassau* and *Victoria* were completely foreign owned, dominated and controlled; that the seamen on those ships were foreign nationals; that the officers of the Ineres Steamship Company, Ltd. were foreign nationals, although from time to time some of them were temporarily resident in this State.

Under these circumstances it would appear to me that the picketing in this case was not for the purpose of pro-

tecting the economic interests or the jobs of American seamen but for the purpose of protecting or acting in sympathy with the foreign national seamen aboard the *Victoria* and the *Nassau;* and that, therefore, would bring it squarely within the holding in the Benz case as pointed out by Mr. Justice Black in the succeeding case—the name always escapes me—in the Marine Cooks and Stewards case, wherein he undertook to draw a distinction between the holding in the Benz case and the holding in the Marine Cooks and Stewards case.

On the authority of these two cases and the language there employed and the reasoning, as well as on the basis of the undisputed facts in the instant case, the Court is constrained to reach the conclusion, as it announced at the outset, that the State court in the circumstances here present has jurisdiction. And therefore the motion by the moving defendants to oust the Court of jurisdiction is denied, with an exception to the defendants.

APPENDIX G

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION WITH THE REPUBLIC OF LIBERIA

August 8, 1938, 54 Stat. 1739, T. S. No. 956

(effective November 21, 1939).

Article VII:

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Article XV:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED (TAFT-HARTLEY)

61 Stat. 136 (1947), 29 U. S. C. §141.

Section 141 [June 23, 1947, 3:17 p. m., E. D. T., c. 120, §1, 61 Stat. 136]:

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 152 [July 5, 1935, c. 372, §2, 49 Stat. 450; June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, §101, 61 Stat. 137]:

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • •

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

• • •

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.